



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. E028 OF 2021

HON UKUR YATANI.....PLAINTIFF/APPLICANT

VERSUS

HON REHEMA DIDA JALDESA.....DEFENDANT/RESPONDENT

RULING

1. The application for consideration is the plaintiff's Notice of Motion dated 8th February 2021, brought under Sections 1A,1B, 3A and 63(e) of the Civil Procedure Act and Order 40 rule 1 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. The application seeks the following orders:

i. Spent

ii. Spent

iii. That this Honourable Court be pleased to issue interim injunctive orders restraining the respondent by herself, her servant and/or agents or otherwise from uttering any defamatory statements against the applicant or further dissemination or causing to be disseminated any defamatory material of or concerning the applicant pending the hearing and determination of the suit filed herewith.

iv. That costs of this application be provided for.

2. The application is premised on the following grounds:

i. On the 18th of January, 2021 the respondent convened a press conference and maliciously uttered false and defamatory statements against the applicant.

ii. The defamatory statements make an array of false and defamatory insinuations against the applicant including:-

a) That the applicant is involved in planning and mobilizing a "strategy to displace the Borana community from Isiolo and Marsabit". In its context, this false allegation is capable of being understood to mean that the applicant has committed crimes under domestic and international law, including purported forcible transfer of population, fanning violence, cattle rustling, theft and other felonies;

b) That the applicant has conspired with other leaders and with government to orchestrate violence and attacks within the Isiolo and Marsabit counties. The natural implication of this allegation is that the applicant is responsible for the alleged insecurity across the region. That allegation is clearly designed to sully the applicant's image.

c) That the applicant seeks to achieve ulterior political ends through sponsoring violence in the region. This falsehood is clearly calculated at evoking disaffection against the applicant both in government and within the community;

d) That the applicant has abused his office as cabinet secretary in breach of the law governing state officers as set out in chapter six of the constitution and the leadership and integrity Act.

e) That the applicant countermands the instructions of the Office of the President on issues of national security. The natural meaning and effect of that allegation is that he is undermining the authority of the Office of the President and has committed

acts of insubordination.

iii. The respondent is in the habit of making malicious and false statements against the applicant and that the recent Utterances by the applicant are evidence of a repeated pattern by the respondent to discredit and defame the applicant since he was appointed to the cabinet. The trend is one that manifestly points to the malicious intention of the respondent towards the applicant.

iv. The incessant defamatory statements made by the respondent have the effect of continually and irreparably harming the professional reputation, social standing and character of the applicant.

v. Unless this Honourable court intervenes and restrains the respondent from uttering defamatory statements against the applicant, the applicant will continue to suffer harm to his reputation and integrity.

vi. It is in the interest of justice that this Honourable court urgently intervenes and issues the orders sought to safeguard the integrity of the judicial process whilst the substantive suit is pending before the Honourable court.

3. The application is further supported by an affidavit by the plaintiff/applicant Hon. Ukur Yatani sworn on 8th February 2021. He deponed that on the 18th day of January ,2021 the defendant/respondent convened a press conference and maliciously uttered false and defamatory statements against him. (**Attached and marked "HUY"**).

4. He avers that based on the respondent's habitual and repetitive pattern of making defamatory remarks against him, that this court in the interest of justice should intervene and issues an injunction restraining her or her agents from further disseminating or causing to be disseminated the said or similar words defamatory against him in print or electronic media.

5. In a further affidavit sworn on 25th March 2021 by the plaintiff/applicant he avers that the utterances made by the defendant/respondent did not amount to fair comment for such a defence to be raised. He avers that the circumstances of the present case satisfy the threshold for grant of interim injunctive orders to restrain further acts of defamation.

6. In opposition to the application, the defendant/respondent Hon. Rehema Dida Jaldesa swore a replying affidavit on 11th March 2021. She deposed that as a member of parliament representing the people of Isiolo county in the national assembly she has an obligation to speak out on matters touching on the people she represents.

7. She confirmed having addressed a press conference on 18th January 2021 on the issue of the attacks on Borana people both in Isiolo and Marsabit counties. She however denied saying that the plaintiff/applicant was involved in planning and mobilizing a strategy to displace them. She depones to having called out on the government in which the plaintiff/respondent is a party for not doing enough to protect the community against security threats.

8. Further, she denies being privy to any publishing of the said statements. She avers that the press statements did not make the plaintiff/applicant suffer reputation injury of any manner. She denies having a habitual and repetitive pattern of making defamatory statements against the plaintiff/applicant.

9. With the leave of the court the plaintiff/applicant filed a long instead of a short further affidavit as sought. He deponed that the defendant/respondent's utterances did not amount to a fair comment on a matter of public interest, since they specifically singled him out. Further that the said utterances were actuated by outright malice, spite and intent to arouse controversy around his service as a cabinet secretary. On this he refers to paragraph 7 of the replying affidavit.

10. He avers that the offending utterances elicited widespread publicity including electronic media platforms which is not disputed. He has set out the links where this can be found at paragraphs 6 and 8 of the further affidavit. He depones having established a prima facie case with proof of irreparable damage, and that the balance of convenience tilts in his favour.

11. Directions were given that the application be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

12. The plaintiff/applicant through his advocate Mr. Melly submitted that the applicant has demonstrated a prima facie case. Firstly, that the impugned publications contained in the statements were defamatory. Secondly that they lowered his reputation and lastly that in publishing the same the respondent was motivated by malice. He relied on the case of **Mrao Limited Vs First American Bank of Kenya Limited & 2 others** (2003) I KLR 125 at page 137 where the court held:

".....a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

13. Counsel submitted that reputation is an interest worthy of protection and that the said slanderous words have caused serious harm to the applicant's reputation as they disparage his profession and title as a cabinet secretary and hence need proof of tangible loss as per Section 3 and 5 of the Defamation Act, Cap. 36 Laws of Kenya which provides:

"In any action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business."

14. Counsel further submitted that the defamatory statements were motivated by malice and that the failure by the respondent to verify the facts on the clashes before publishing them was out rightly malicious. On this he relied on the case of Phinehas Nyagah v Gitobu Imanyara (2013) eKLR which held as follows:

“Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a fair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn. Any evidence, which shows that the defendant knows the statement was false or did not care whether it be true or false will be evidence of malice.”

15. Further, counsel submitted that where the balance of convenience lies the court should look at the freedom of expression which is not absolute. He argues that in this case the balance tilts in favour of the plaintiff/applicant since the respondent’s freedom of expression does not extend to offending the character of the applicant as provided for under Article 33(3) of the Constitution of Kenya.

16. He relied on case of Gilgil Hills Academy Ltd vs The Standard Ltd Nakuru HCCC 88 OF 2009 where Maraga J (as he then was) held as follows;

“For that reason, it is in the public interest that individuals should possess the right of free speech, and, indeed, that they should exercise it without impediment, so that right is not whittled down, the jurisdiction to grant an injunction at an interlocutory stage is a delicate and special one and ought to be exercised only in the clearest of cases. Needless to say that the individual right of free speech or of freedom of expression is enshrined in Section 79 of the Constitution. That section, however, provides riders. The one relevant to this case is the protection of the reputation and rights of others.”

17. It is also his submission that the applicant has not only met the conditions for grant of an interim injunction but also established that this case warrants the grant of the same.

18. In rebuttal, Mr. Ongoya for the defendant/respondent submitted that the respondent has sufficient understanding that serious allegations which border on corruption and economic crimes ought to be raised before relevant state organs which deal with such issues.

19. In his submissions counsel contends that an injunction in such cases must be specific in order to prevent such impairment or impediments of freedom of free speech and expression should be taken care of. The courts are therefore, not to issue injunctions which will rapture the law and the constitution.

20. He relied on the case of Francis Atwoli & 5 Others –V Hon Kazungu Kambi & 3 Others Nairobi High Court Civil Suit No.60 of 2015, where the court stated;

“One other thing, even if the Plaintiffs were successful, it would have been difficult to grant the orders as sought. The orders sought as set out at the beginning of this ruling are too wide. I am doubtful if a court of law directing its mind properly can issue such an order. The order is too general, wide, imprecise and incapable of comprehension. A Defendant faced with such an order will be at a loss as to what words or statements that are defamatory that he is being restrained from using or uttering. To my mind, a Plaintiff who wants a court to issue an order of injunction in a defamation case must set out the words sought to be restrained with precision and exactitude for purposes of enforcement of such an order. In the present case, I am afraid; the order sought was too general to have any precise meaning.”

Analysis and Determination

21. I have considered the application, affidavits and the written submissions plus authorities cited by both counsel. The issue falling for determination is whether the plaintiff/applicant has satisfied the threshold for grant of an interim injunction.

22. The case of Giella vs Cassman Brown [1973] EA 358 sets out the conditions to be established before an order of injunction is granted. These are:

- (i) The plaintiff must establish that he has a prima facie case with high chances of success.
- (ii) That the plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.
- (iii) If the court is in doubt it will decide on a balance of convenience.

23. It is however noted that besides the conditions set out in the Giella case (supra) the need to be more cautious in a defamatory case is high. In the case of Cheserem v Immediate Media Services & 4 others Justice Khamoni (as he then was) had this to say of such cases:

“Application for interlocutory injunction in defamation cases are treated differently from ordinary cases because they bring out a conflict between private and public interest. Though the conditions applicable in granting interlocutory injunctions set out in Giella vs Cassman Brown & Co. Ltd [1973] EA 258 generally apply. In defamation cases those conditions operate in special

circumstances. *Over and above the test set out in Giella's case, in defamation cases the court's jurisdiction to grant an injunction is exercised with the greatest caution so that an injunction is granted only in the clearest possible cases (emphasis mine). The court must be satisfied that the words or matter complained of are libelous and also that the words are so manifestly defamatory that any verdict to the contrary would be set aside as perverse. Normally the court would not grant an interlocutory injunction when the defendant pleads justification or fair comment because of the public interest that the truth should be out and the court aims to protect a humane, responsible, truthful and trustworthy defendant.*"

24. Before determining the above issue it is important to set out the various principles on the law of defamation. Article 33(2) and (3) of the Constitution provides:

"(2) The right to freedom of expression does not extend to-

(a)	propaganda	for	war;
(b)	incitement	to	violence;
(c)	hate	speech;	or
(d)	advocacy of hatred that—		

(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others."

26. This, in my view, is the constitutional fulcrum of the law of defamation. Accordingly, the law of defamation is not just anchored on a statutory enactment but has been given a constitutional underpinning as well. In a tort for defamation the Court is therefore under a duty to balance the public interest with respect to information concerning the manner in which its affairs are being administered with the right to protect the dignity and reputation of individuals.

27. In the plaint the plaintiff/applicant has been described as a state officer currently serving as the cabinet secretary National treasury and planning, while the defendant/respondent is described as the Isiolo county member of the National assembly (Women's representative). Each of them is a leader in his/her own right. The defendant/respondent denies having uttered some of the words complained of as she addressed the people of Isiolo county. It is here that a line needs to be drawn on what the defendant/respondent should be enjoined from uttering bearing in mind that she is a people's representative.

28. On the other hand the plaintiff/applicant a state officer is keen on maintaining his reputation. Again this is where the court is called upon to balance the public and private interest. Does this court gag the defendant/respondent from informing the people she represents about the happenings in their county?

29. Faced with a similar scenario Justice Mbogholi Msagha in the case of Ahmed Adan v Nation Group Limited & 2 others [2016] eKLR had this to say:

"Whether or not there is libel is primarily a question of fact. In order to grant an interlocutory injunction the court would have to come to a decision upon that question of fact before trial and upon untested affidavit evidence. It must therefore be manifest that the matter complained of is libelous and that that fact is unlikely to change at trial. The defamation complained of must be obvious, atrocious and wholly unjustified. It must be a kind inflicting the most serious injury to a plaintiff's character and reputation. Should the court entertain a doubt that the words complained of are defamatory, interlocutory injunction will not be granted, for it is important, in the public interest, that the truth be known.

The test in defamation cases should therefore go beyond that obtaining in ordinary cases. It will not be sufficient merely for the plaintiff to establish a prima facie case with a probability of success and irreparable loss. There are also instances when interlocutory injunction will be very difficult to obtain no matter how strong the plaintiff's case.

These instances include where justification is pleaded. Where the defendant pleads that he will be able to prove that the words complained of are true, unless the court is clearly satisfied that he will not be able to do so, it will not grant interlocutory injunction. See Gatley para. 27.5, 27.6 In *Bonnard vs Perryman* [1891] 2 Ch. 269, it was explained –

"the right of free speech is one which it is for the public interest that individuals should possess and indeed that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed..."

30. Justice Mabeya in a similar scenario in the case of Francis Atwoli & 5 others v Hon. Kazungu Kambi & 3 others Nairobi High Court Civil Suit No. 60 of 2015 stated as follows at paragraph 23:

"One other thing, even if the Plaintiffs were successful, it would have been difficult to grant the orders as sought. The orders sought as set out at the beginning of this ruling are too wide. I am doubtful if a court of law directing its mind properly can issue such an order. The order is too general, wide, imprecise and incapable of comprehension. A Defendant faced with such an order will be at a loss as to what words or statements that are defamatory that he is being restrained from using or uttering. To my mind, a Plaintiff who wants a court to issue an order of injunction in a defamation case, must set out the words sought to be restrained with precision and exactitude for purposes of enforcement of such an order. In the present case, I am afraid, the order sought was too general to have any precise meaning."

31. Having weighed all the material placed before this court I find that this court has to balance between the two competing interests i.e. (i) public speech (ii) Private interest to reputation as enshrined in the Constitution.

32. A keen look at the notice of motion and in particular prayer no. 3 the plaintiff/applicant wants the defendant/respondent barred from uttering any defamatory remarks. This is so general. A defamatory remark would mean anything not pleasant to the plaintiff/applicant but very accommodative to the defendant and the people she represents. That is why it was imperative for the plaintiff/applicant to clearly spell out what the defendant/respondent is to be gagged from uttering. Secondly the dissemination of any such material is by other persons or bodies who are not parties in this suit. How would they be enjoined?

33. On this, I entirely agree with Justice Mabeya's decision in the case of **Francis Atwoli & 5 others (supra)** on the issuance of an injunction order in a defamatory case. It must be clearly spelt out what the respondent should be enjoined from saying. This is in no way to suggest that the defendant/respondent is at liberty to say anything she feels like saying against the plaintiff/applicant. If there be anything wrong she thinks the plaintiff/applicant has done, it would be prudent for her to report to the relevant authorities for investigation and necessary action.

34. For the above reasons I find that the plaintiff/applicant has failed to demonstrate that he is deserving of the orders sought in the application dated 8th February 2021. The application is dismissed.

35. Costs shall be in the cause.

Orders accordingly.

DELIVERED ONLINE SIGNED AND DATED THIS 26TH DAY OF MAY 2021 AT NAIROBI.

H. I. ONG'UDI

JUDGE